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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE PECHANGA BAND OF MISSION INDIANS,

Petitioner,

vs.

KACOR REALTY, INC., etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, the Pechanga Band of Mission Indians, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 22, 1982.

QUESTIONS PRESENTED

1. Under the Mission Indian Relief Act of January 12, 1891, was it essential for the Secretary of the Interior to include in a formal patent *all* parcels to be included in an Indian tribe's reservation, thereby terminating whatever interest the tribe may have had in a parcel excluded from the patent but included in the reservation by the previous Congressionally-authorized Presidential Executive Order of June 27, 1882?

2. Is it clear from the surrounding circumstances and legislative history of the Mission Indian Relief Act of January 12, 1891 that the Secretary of the Interior intended to terminate a portion of the Pechanga Indian Reservation created by a previous Congressionally-authorized Presidential Executive Order when the following circumstances existed: (1) the parcels in question had previously been patented to a homesteader who admittedly obtained his patents by fraud against the United States; (2) the United States began, but then abandoned, efforts to annul the fraudulent patents; and (3) the avowed purpose of the Act was to protect, not to diminish, the rights of tribes in lands previously reserved to them under previous Congressionally-authorized Presidential Executive Orders?

3. If, as the Court of Appeals held, the failure of the Secretary of the Interior to include in a patent under the Mission Indian Relief Act of January 12, 1891 certain parcels of land previously included in an Indian Reservation by a Congressionally authorized Presidential Executive Order removed those parcels from the reservation, without any revocation of that previous Executive Order and without any express restoration of the omitted parcel to the public domain, then why was it necessary for the

President to make such an express revocation and restoration by another Executive Order for certain other parcels also omitted from the same patent to be removed from the same reservation?

PARTIES

The parties to this proceeding are the Pechanga Band of Mission Indians (a federally-recognized tribe of Indians), Kacor Realty, Inc. (a California corporation), Safeco Title Insurance Co. (a California corporation), Murdy Foundation (a California corporation), John A. Murdy III, George A. Trotter, Jr., and J.A. Murdy, Jr.

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The opinion of the Court of Appeals is reported at 680 F.2d 71 and appears as Appendix B. The unreported opinion of the District Court appears as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on June 22, 1982. Petitioner filed a motion for rehearing on July 3, 1982, which was denied by the Court of Appeals on July 21, 1982. By his order of October 18, 1982, Justice Rehnquist extended the period for the filing of this petition to and including November 18, 1982.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portions of the pivotal statute, the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712), are reproduced as footnote 3 to the opinion of the Court of Appeals, reproduced as Appendix B.

STATEMENT OF THE CASE

The Pechanga Band of Mission Indians is an impoverished federally-recognized Indian tribe. About half its members live on its 3,600-acre reservation located about 60 miles northeast of San Diego, California. The reservation is located near the Band's ancestral village site from which its members were forcibly evicted in 1875. Under the authority of the Four Reservations Act of April 8, 1864 (13 Stat. 39), under which the Mission Indian Reservation was established by various Presidential Executive Orders as a multi-tract non-contiguous reservation, along with three other reservations throughout California, President Arthur issued his Executive Order of June 27, 1882 establishing the reservation to include most of five sections of land. See *Mattz v. Arnett*, 412 U.S. 481, 494 (1973).

Because this and similar Executive Orders for other tracts proved insufficient to deter trespassing by non-Indians, Congress passed the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712). Under this statute, the President appointed a Commission whose function it was to recommend appropriate permanent reservations for the various Bands of Mission Indians to the Secretary of the Interior, who would issue formal patents to those lands declaring that the United States would hold these lands in trust for the various Bands.

The Commission recommended that all parcels included in the June 27, 1882 Executive Order be included in the patent for the Pechanga Indian Reservation and, to afford the greatest possible protection to the Pechanga Band's interest in those lands even before the patent issued, President Harrison issued an additional Executive Order on December 29, 1891 reserving those parcels from further disposition until the patent could issue. However, as to two parcels included in the 1882 and 1891 Executive Orders, it was noticed in 1893, when the Secretary was about to patent all the parcels to the Pechanga Band, that a homesteader had completed the last steps required for him to entitle him to a patent for one parcel (the homestead parcel) on September 27, 1882, which patent had been issued on June 12, 1885. Similarly, the settler had completed his duties toward a second parcel on January 5, 1882, receiving a patent for his parcel (the pre-emption parcel) on September 20, 1882. Both the homestead parcel and the pre-emption parcel were included in the Pechanga Indian Reservation by the 1882 and 1891 Executive Orders, as were two other similarly disposed of parcels not now at issue.

After investigation, it was learned that the settler had obtained both his parcels by fraud against the United States. At the request of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office, the Attorney General filed actions in federal circuit court to annul the fraudulent patents.

Meanwhile, it was necessary for some patent to be issued to the Pechanga Band, at least for those parts of the reservation included in the 1882 and 1891 Executive Orders as to which there were no adverse claims. Such a limited initial patent was issued on August 29, 1893 after the Commissioner of Indian Affairs on August 15, 1893 recommended:

> that the Commissioner of the General Land Office be directed to cause a patent to issue to the Temecula [Pechanga] band or village of Mission Indians for such of the tracts designated in office letter of July 28, 1893, as are found to be free from conflicts, *and to subsequently issue a similar patent for such of the remaining tracts as may hereafter become free of conflict.* [Emphasis added]

However, the contemplated second patent for the homestead and pre-emption parcels was never issued because the Attorney General had the suits dismissed with no defendant having been served in 1901 when he was informed that title to the two parcels had passed into bona fide purchasers.

Because the United States took no further steps to clear the title to these two parcels and to include them in the Pechanga Indian Reservation by the above contemplated second patent, the Pechanga Band itself filed a civil action against the present occupants of the parcels on November 28, 1978 in the U.S. District Court for the Central District of California, pursuant to 28 U.S.C. §§1331 and 1362. After striking a counterclaim and various defenses, the District Court entered summary judgment for the defendants on August 25, 1980. The Court of Appeals for the Ninth Circuit affirmed on June 22, 1982 (680 F.2d 71) on the single narrow ground that, even if the homestead and pre-emption parcels were properly part of the Pechanga Indian Reservation under the 1882 and 1891 Executive Orders, the United States acted to extinguish the Band's interest in those parcels by failing to include them in the 1893 patent. 680 F.2d 75. Because the Pechanga Band believes that its prior interest in these two rural, unimproved parcels, totaling 318 acres, survived their exclusion from the 1893 patent, the Band now seeks review of the Court of Appeals'

judgment so that judgment may be reversed and the case remanded to the Court of Appeals for a determination of the merits of the Band's claim.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the Court of Appeals forecloses similar land claims by up to nineteen Indian tribes, contrary to this Court's teachings.

Under the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712) approximately nineteen separate Indian reservations were created and patented to the respective Bands. Several, in addition to the Pechanga Band, have asserted or are preparing similar land claims. If the Court of Appeals' opinion that, under the Act, "the Secretary *had* to issue a patent to the land in order to include it in the reservation" (680 F.2d at 75, emphasis added) remains unimpaired, then all these claims will be foreclosed for parcels included in the Executive Orders from the 1875-1891 period but omitted from the post-1891 patents for one reason or another.

So to foreclose such claims would be contrary to this Court's teachings in cases such as *U.S. v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1942) to the effect that a tribe's mere acceptance of a reservation does not necessarily extinguish its claim to lands outside that reservation. Furthermore, there has been a very strong Congressional interest in insuring that sufficient time will be available for all such claims to be filed before the oft-extended statute of limitations expires on December 31, 1982. See, e.g., P.L. 96-217, 94 Stat. 126, 28 U.S.C. §2415, and its legislative history, 1980 U.S.C.C. & A.N. vol. 2, pp. 206-216. Not only would foreclosing all these claims violate this policy of achieving a prompt and final resolution of all such claims on their merits, but an unknown number of other tribes which received patents under statutes other than the Mission

Indian Relief Act would hesitate to assert, if not abandon, their similar claims, thereby further frustrating the above Congressional policy.

In addition, this Court has held that an error on the part of federal officials cannot be imputed to an Indian tribe so as to defeat the tribe's claims. *Santa Fe, supra*, 314 U.S. at 360; *Cramer v. U.S.*, 261 U.S. 219, 234 (1923). The Pechanga Band asserts that the Attorney General was in error in having the actions to annul the fradulently-obtained patents for the instant parcels dismissed because title to them had passed into parties who were supposedly bona fide purchasers. So to impute the Attorney General's error to the Pechanga Band is thus contrary to *Santa Fe* and *Cramer, supra*, and would cast an obvious pall over any similar tribal claims not pursued by the United States for similar reasons.

II.

The Court of Appeals' opinion is contrary to this Court's only opinion construing the purpose of the Mission Indian Relief Act.

This Court's only opinion regarding the purpose of the Mission Indian Relief Act is *Arenas v. U.S.*, 322 U.S. 419 (1944) in which this Court stated that

> The Mission Indians had deserved well and had fared badly and Congress passed the Mission Indian Act of [January 12] 1891 for their particular redress.
> *Id.*, 322 U.S. at 421

> Eventually the country was aroused by their plight and set up a commission to investigate their grievances and to make recommendations for their protection and relief. It reported in 1884 and its recommendations were substantially embodied in the Mission Indian Act of 1891.
> *Id.*, 322 U.S. at 427-8

The Court of Appeals' opinion reads the Mission Indian Relief Act as authorizing the Secretary, by merely failing to include the homestead and pre-emption parcels in the

1893 patent, to divest the Pechanga Band of its prior interest in the two parcels under the 1882 and 1891 Executive Orders. To do so is entirely inconsistent with the purpose of the Mission Indian Relief Act for the "protection and relief" of the Mission Indians with regard to protecting their interests in land, as stated in *Arenas*. This is particularly evident from the Commissioner's above-quoted letter which sought to afford the maximum possible protection to the Pechanga Band's land interests by issuing a patent immediately for the undisputed portions of the reservation, with a second patent to follow for other parcels when title difficulties were settled.

To read the Mission Indian Relief Act so narrowly as to imply a divesture of Indian property rights from such an understandable reluctance on the part of the Secretary and Commissioner to delay issuing a patent for the entire reservation, while further encroachments could occur, merely to allow time to annul the fraudulently-obtained patents, also contravenes the "eminently sound and vital canon" of construction, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655, n. 7 (1976), that "Ambiguities in federal law have been generously construed" in favor of Indian interests, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). To the extent that the Mission Indian Relief Act's provisions regarding allotment were ambiguous, this Court followed this rule in resolving the ambiguity in favor of the Indian interest in *Arenas*. The Court of Appeals did not do likewise in the present case, and thus has departed from *Arenas*, to the detriment of the Pechanga Band and any other Mission Indian Band which relies on *Arenas*' reading of the purpose and the resolution of ambiguities in the Mission Indian Relief Act.

III.

The Court of Appeals opinion departs from the standard of clarity of purpose set by this Court for finding a termination of reservation status.

In a modern series of cases, this Court has held that a Congressional purpose to terminate the reservation status of part of an Indian reservation "must be expressed on the face of the Act or be *clear* from the surrounding circumstances and legislative history." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 568 (1977), quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1972), emphasis added. The face of the Misison Indian Relief Act does not disclose any intention to permit the Secretary to divest the Band of its interest in the subject parcels by merely failing to include them in an initial patent, especially under the above circumstances. As *Arenas* teaches, the purpose of the Act was entirely to safeguard existing Indian property rights under the pre-1891 Executive Orders. Thus, the legislative history and surrounding circumstances of this statute come nowhere near meeting the standard of *clarity* needed to terminate reservation status. On the contrary, these sources, as noted above, display a pellucid clarity of purpose to preserve reservation status. For this reason, the Court of Appeals has deviated seriously from this Court's above standard.

The significance of this error for all other Indian land claims, both those arising under this statute and those arising under other statutes, is illustrated by the treatment accorded by the United States to *other* parcels included in Indian reservations under pre-1891 Executive Orders, but omitted from post-1891 patents. For example, by promulgating his Proclamation of May 15, 1905 (34 Stat. 602), President Roosevelt expressly restored a certain parcel to the public domain, which parcel had been included in the reservation for the Capitan Grande Band of Mission Indians as previously established by the Executive Order of December 27, 1875 and the very same Executive Order of

December 29, 1891 affecting the subject parcels noted above. Why did the President have to make such an express revocation of the previous Executive Order if the mere exclusion of the parcel from the patent would have been sufficient, as the Court of Appeals has held? Why did President Cleveland issue his Executive Order of January 25, 1886 to remove a certain parcel from the Pechanga Indian Reservation, as established by the Executive Order of June 27, 1882, if such an express act was unnecessary?

The only answer to these questions is that the mere inadvertance of the Secretary under the Mission Indian Relief Act cannot operate to revoke the reservation status of a parcel included in a reservation under a previous Executive Order. Another Executive Order or Proclamation is needed, not just the Secretary's failure to include the parcel in a patent. This conclusion is really the teaching of this Court in *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975), *Mattz v. Arnett*, 412 U.S. 481, 504-5 (1973) and *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962) that "... when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *U.S. v. Celestine*, 215 U.S. 278, 285 (1909). In short, to terminate reservation status, it is necessary to show an act of equal stature and dignity to the act which gave reservation status.

No such act of equal stature or dignity, such as the Proclamation of May 15, 1905, was present here. Even though the Secretary may have wide discretion under the Mission Indian Relief Act, he did not have the power, by the mere inadvertance of intending to delay issuance of a patent for the subject parcels until their titles were clear, to terminate reservation status. To set forth this rule in the context of the Secretary's actions under a statute, rather than only in the context of Congress' own intention through statutes, as in *Rosebud*, *DeCoteau*, *Mattz*, and *Seymour*, would afford guidance to all courts faced with this as-yet unanswered question, and would eliminate those cases, as

here, where the clarity of purpose to disestablish, as enunciated in *Rosebud*, *DeCoteau*, and *Mattz*, *supra*, was not thought necessary merely because the action was the Secretary acting under a statute rather than Congress acting itself. This Court has not yet had occasion to consider whether this standard of clarity, as developed in these cases from the *Celestine* principle, extends to this context, and the question should now be addressed.

CONCLUSION

For the above reasons, the Pechanga Band of Mission Indians urges the Court to grant the petition to address these important unanswered questions of federal Indian law, and to review the Court of Appeals' erroneous interpretation of *Arenas* and the other cases noted above.

November 18, 1982 Respectfully submitted,

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